Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
ADJUSTMENT OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	Docket No. 2006-1 CRB DSTRA

Testimony of

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July 24, 2007

Fisher

1. I have been asked to present testimony in the rebuttal phase of this proceeding. Specifically, I have been asked to address: (1) the function of compulsory licenses in the copyright system; (2) the considerations that should guide the application of sections 114(f)(1) and 801(b)(1) of the copyright statute to the determination of the fees paid by eligible preexisting satellite digital audio radio services ("SDARS"); and (3) the relevance to the present proceeding of the manner in which section 111(d) of the statute has been applied in the past to the determination of the compulsory-license fees paid by cable television systems in exchange for the privilege of making secondary transmissions of programs broadcast over the airwaves.

2. I have read much of the testimony submitted in the principal phase of this proceeding. I have paid especially close attention to the submissions of Prof. Janusz Ordover and Dr. Michael Pelcovits on behalf of SoundExchange. Both of those experts have asserted, in their written submissions and in their oral testimony, that the Court should strive to select "a rate that would be established by the parties in a marketplace free of regulatory compulsion and other distortions that could impede the parties from reaching efficient outcomes."[1] In my professional judgment, this claim reflects a serious misunderstanding of the purposes of the copyright system as a whole and the manner in which sections 114 and 801 are designed to advance those purposes. The principal purpose of my testimony is to rebut the contentions of Prof. Ordover and Dr. Pelcovits,

[1] Testimony of Janusz Ordover at 4. See also Testimony of Michael Pelcovits at 5: "I adopt Dr. Ordover's view that here, the policy objectives set out by Congress [in 801(b)] are most fully satisfied by rates that would be the likely outcome of marketplace negotiations among the individual record companies and the individual SDARS."

offering in their stead an interpretation of the governing statutory provisions that better accords with the language, history, and policy objectives of those provisions.

I. Professional Qualifications

3. I am the Wilmer Hale Professor of Intellectual Property Law at Harvard Law School, where I have taught for 23 years. My principal fields of specialization are Copyright and Patent Law. I am also the Director of the Berkman Center for Internet and Society, a research center at Harvard Law School committed to the study and exploration of the Internet and its accompanying laws.[2] Finally, I am the Chairman of the Board of Directors of Noank Media, Inc., a recently formed company that seeks to solve the current crisis in the entertainment industry by obtaining voluntary blanket licenses from copyright owners and then making their works available, for fees, to students in participating universities and to the subscribers of participating Internet service providers.[3]

4. My academic credentials include a J.D. and a Ph.D. in the History of American Civilization from Harvard University and a one-year fellowship at the Center for Advanced Study in the Behavioral Sciences. Before beginning my teaching career, I served as a law clerk for Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit and for Justice Thurgood Marshall of the United States Supreme Court.

[2] Additional details concerning the Berkman Center may be found at http://cyber.law.harvard.edu/home/.

[3] Additional details concerning Noank Media may be found at http://www.noankmedia.com/.

5. I have published widely. My principal publications in the field of copyright law are listed in the margin.[4] I have given invited presentations concerning the changing shape of music-related copyright law in many settings. A representative sample of the venues are listed in the margin.[5] I have also provided advice to the governments of several countries – Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, and the

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[4] My primary publications pertaining to copyright are:

Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1659 (1988);

Property and Contract on the Internet, 73 CHI.-KENT L. REV. 1203 (1999);

The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States, published (in German translation) in EIGENTUM IM INTERNATIONALEN VERGLEICH 265-91 (Vandenhoeck & Ruprecht, 1999);

Theories of Intellectual Property, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (S. Munzer ed., Cambridge Univ. Press, 2001) (Mandarin translation, 1 CHINESE INTELLECTUAL PROPERTY REVIEW 1 (2002));

"Copyright," "Patent," and "Intellectual Property," ENCYCLOPÆDIA BRITANNICA (2004 and current edition);

PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (Stanford University Press, 2004);

"The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age" (with William McGeveran) (August 2006), available at http://cyber.law.harvard.edu/media/files/copyrightandeducation.html.

[5] Some of the venues in which I have given lectures on the subject of music-related copyrights are:

Digital Distribution and the Music Revolution, Queensland Parliament House, Brisbane, Australia, July 1999;

"Digital Music," United States Embassy, Stockholm, Sweden (at the invitation of the United States Information Agency), September 1999;

Signal to Noise: The Future of Music on the Net, Harvard Law School, February 25, 2000 (http://cyber.law.harvard.edu/events/netmusic.html);

Conference on *A Free Information Ecology in the Digital Environment*, New York University School of Law, March 30 - April 2, 2000;

"Digital Music," Annenberg School for Communication, University of Southern California, June 14, 2000;

International Congress on Intellectual Property, Rio de Janeiro, Brazil, August 10-11, 2000;

First International Conference on Cyberspace Law, Sao Paulo, Brazil, November 6-7, 2000;

The Future of Music Policy Summit, Washington D.C., January 10-11, 2001 (http://www.futureofmusic.com/);

Keynote Address, *OECD Conference on The Future Digital Economy: Digital Content Creation, Distribution, and Access*, Rome, January 30-31, 2006;

"The Path of Copyright in a User Generated World," Brisbane, Australia, March 7, 2007;

Keynote Address, *International Federation of Musicians Annual Meeting*, Nashville, Tennessee, May 18, 2007;

Keynote Address, "Copyright Utopia: Alternative Visions, Methods & Policies," *Center for Intellectual Property*, Adelphi, Maryland, May 21-23, 2007.

United Kingdom – concerning the shape or application of their intellectual property laws.[6]

6. Some years ago, I submitted testimony to a Copyright Arbitration Royalty Panel in a proceeding that set the rates for eligible nonsubscription webcasting services. More recently, I testified before the Subcommittee on Twenty-First Century Competitiveness of the House Committee on Education and the Workforce concerning the responsibilities of universities to reduce the frequency with which their students engage in unlawful file-sharing.

7. A copy of my curriculum vitae is attached to this document as Appendix A.

II. The Copyright System and the Role of Compulsory Licenses

8. The copyright system has two fundamental, compatible purposes: to create incentives for the production and dissemination of "original works of expression"; and to provide the creators of those works a fair return for their labor. It achieves those ends by protecting the creators against competition in the reproduction, distribution, modification, and performance of their works.[7]

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[6] The principal documents embodying my recommendations are: CENTROAMÉRICA EN EL SIGLO XXI: UNA AGENDA PARA LAW COMPETITIVIDAD Y EL DESARROLLO SOSTENIBLE (Harvard Institute for International Development 1999); Martha Field & William Fisher, LEGAL REFORM IN CENTRAL AMERICA: DISPUTE RESOLUTION AND PROPERTY SYSTEMS (John F. Kennedy School of Government 2000); *The Impact of "Terminator Gene" Technologies on Developing Countries*, in COSTS AND BENEFITS TO THE LIVELIHOODS OF THE RURAL AND URBAN POOR ARISING FROM THE APPLICATION OF SO-CALLED "TERMINATOR GENES" AND SIMILAR TECHNOLOGIES IN DEVELOPING COUNTRIES (Report to the United Kingdom Department for International Development, 1999).

[7] See, e.g., Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985) ("The monopoly created by copyright … rewards the individual author in order to benefit the public"), quoting Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 477 (1984) (dissenting opinion); Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 349-50 (1991).

9. But the legislators and judges who have crafted the copyright system – and the scholars who have assessed it – have long recognized that the entitlements it establishes can sometimes be abused. In other words, if unconstrained, the exercise of the rights it confers on creators can sometimes frustrate, rather than advance, the underlying purposes of the system.[8]

10. To prevent such abuses, legislators and judges have built into the copyright system a variety of provisions that set limits on creators' rights.[9] The most obvious is the term limit; unlike other property rights, copyrights are limited in time – currently, to the life of authors plus 70 years.[10] Another important general limitation is the fair-use doctrine, which prevents copyright owners from blocking uses of their works, such as criticism and parody, that have important social benefits.[11] Other limiting provisions are more specific, creating safe harbors for particular unauthorized uses of copyrighted works that redound to the benefit of the public. An example is the privilege of teachers to perform copyrighted works in their classrooms.[12]

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[8] See, e.g., Peter Menell & Suzanne Scotchmer, *Intellectual Property*, in A. Mitchell Polinsky & Steven Shavell, HANDBOOK OF LAW AND ECONOMICS, VOLUME 2 (forthcoming 2007) (available from the Social Science Research Network, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=741424), at 3.

[9] See, e.g., Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) ("Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible."); Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 431-32 (1984) ("The limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'") (quoting Twentieth Century Music v. Aiken, 422 U.S. 151, 156 (1975)).

[10] 17 U.S.C. §302(a). The term limit for anonymous works, pseudonymous works, and works made for hire is calculated on a different basis. See 17 U.S.C. §302(c).

[11] See 17 U.S.C. §107.

[12] See 17 U.S.C. §110(1). Other exemptions are contained in other subsections of §110.

11. An important subset of these public-regarding privileges consists of compulsory licenses. Unlike outright exemptions – such as the fair-use doctrine and the classroom-performance provision – compulsory licenses do not permit people to use copyrighted works without permission for free. Rather, they take an intermediate position. They permit copyright owners to collect fees when people engage in specified uses of their materials, but they forbid copyright owners to deny permission altogether, and they limit how much copyright owners can charge. For that reason, compulsory licenses are commonly and accurately described as "compromises" between the interests of copyright owners and copyright users.[13]

12. Congress has used compulsory licenses to strike such compromises in a wide variety of contexts. One of them redounds to the benefit of the recording industry: section 115 of the statute limits the amount that the owners of copyrights in musical works can charge recording artists or record companies that wish to make and distribute sound recordings that consist of "covers" of songs that have already been released by other artists. Another – section 118 – benefits public broadcasters. Still another (to which I will return at the end of my testimony) benefits cable television systems.

13. A recurring situation in which Congress has repeatedly employed compulsory licenses is where the advent of a new technology for distributing or performing copyrighted works both offers copyright owners a new potential revenue stream and offers the public a more convenient or flexible way of gaining access to those works. In such circumstances, Congress has frequently taken the position that, while copyright owners should certainly reap a benefit from the new technology, they ought not be

[13] See, e.g., Julie E. Cohen et al., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 439 (2006); Robert A. Gorman and Jane C. Ginsburg, COPYRIGHT 45 (2002).

permitted to charge so much for the right to make use of their works as to stunt the deployment of the new technology – or to reduce incentives for the development in the future of analogous technologies.

14. The case before us falls into this subcategory. The technology at issue is satellite radio – a remarkably efficient way of delivering large quantities of high-quality digital audio programming to consumers in their cars and homes. In the late 1990s, when Congress was confronted with the question of how to deal with this new system (which had not yet been implemented), it recognized the potentially large benefits to copyright owners (as well as to the public) of the technology. On the other hand, it recognized the enormous cost required to develop and deploy the technology, purchase the necessary licenses from the FCC, and build a consumer base. Indeed, as testimony submitted in the primary phase of this processing makes clear, after many years, neither of the two pioneering systems – Sirius and XM – is profitable.

15. Accordingly, Congress adopted a compromise. On one hand, the pioneering satellite services (unlike traditional radio stations) were required to pay for the right to broadcast sound recordings. On the other hand, the owners of the copyrights in those sound recordings were not permitted to determine the amount of the royalty payments. Rather, a government body – originally a Copyright Arbitration Royalty Panel, now this Court – would determine the fee.

16. The standard that Congress selected for determining the amount of the compulsory fee reflects that compromise – in other words, manifests and achieves Congress' desire to balance several goals. Sections 114(f)(1) and 801(b)(1) provide, in pertinent part:

§114(f)(1)(A): Proceedings under chapter 8 [17 U.S.C. §§ 801 et seq.] shall determine reasonable rates and terms of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services[14] specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced....

§114(f)(1(B): In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)

§801(b)(1): The rates applicable under sections 114(f)(1)(B) ... shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The purpose of the present proceeding is to set the rates that the SDARS will pay for the next six-year period, relying on these guidelines.

17. Experts on behalf of SoundExchange – specifically Prof. Ordover and Dr. Pelcovits – have urged the Court in effect to ignore both the language of the governing statutory provisions and the aspirations of the compulsory licensing system as a whole. As indicated above, they contend that the Court should strive to select "a rate that would

[14] "Preexisting satellite digital audio radio services" are defined in section 114(j)(10) of the statute. There is no dispute that the parties to this proceeding fall within that definition.

be established by the parties in a marketplace free of regulatory compulsion and other distortions that could impede the parties from reaching efficient outcomes."[15] In other words, they argue that the Court should select the rate that would emerge from voluntary transactions among the parties – i.e., the rate that would arise if a compulsory license did not exist.

18. The approach they propose suffers from several fatal defects. First and most obviously, it ignores the plain language of the governing statutory provisions. Section 801(b)(1) expressly instructs the Court to consider such matters as "maximiz[ing] the availability of creative works to the public," "minimiz[ing] any disruptive impact" on the satellite-radio industry, the relative contributions made and risks borne by the SDARS and the copyright owners in creating this new industry, and providing *both* copyright owners and the SDARS "fair" returns. The methodology the SoundExchange experts urge upon the Court would reduce all of these statutory factors to surplusage. Indeed, the approach they propose would render the entire compulsory license pointless. If our goal were to mimic the market, we should dispense with this expensive administrative apparatus and simply let the market work. Plainly, Congress had something else in mind.

19. Second, the approach proposed by the SoundExchange experts ignores the history of interpretations of section 801(b)(1). In several other settings governed by that same statutory provision, administrative tribunals and courts have expressly considered the factors that the SoundExchange experts now seek to read out of the statute. No tribunal or court called upon to construe the provision has focused exclusively upon what the parties, left to their own devices, would negotiate on their own. On the contrary, each

[15] See note 1, supra, and accompanying text.

one, when offered such a construction, has rejected it.[16] Congress, when it decided to give the SDARS the benefit of a rate-setting procedure governed by section 801(b)(1), was certainly aware of the way in which it had been construed in the past. To repudiate that construction now would be to flout Congress' intent.

20. Finally and most fundamentally, the approach of the SoundExchange experts misunderstands both the nature of the copyright system as a whole and the roles played within it by compulsory licenses. Copyright law deliberately departs from the "free market." It confers upon authors a power not enjoyed by sellers in the overwhelming majority of markets – namely the power to suppress competition with respect to the relevant product or service. In other words, copyright law (like patent law) intentionally grants the creators of innovations (for which there do not exist good substitutes)

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[16] See Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1, 21-23 (D.C. Cir. 1982) ("[S]ome of the statutory factors require the Tribunal to estimate the effect of the royalty rate on the future of the music industry…. [O]ther statutory criteria invite the Tribunal to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users…. Finally, the statutory factors pull in opposing directions, and reconciliation of these objectives is committed to the Tribunal as part of its mandate to determine "reasonable" royalty rates."); Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144, 1157-58 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982); Recording Industry Association of America v. Librarian of Congress, 176 F.3d 528, 533-34 (1999) ("RIAA's claim that the statute clearly requires the use of "market rates" is simply wrong. Section 801(b)(1) requires only that arbitration panels set "reasonable copyright royalty rates." The statute does not use the term "market rates," nor does it require that the term "reasonable rates" be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a "market rate" may not be "reasonable," and vice versa."); Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 888-89 (Copyright Royalty Tribunal 1981) (tempering attention to "marketplace parallels" with analysis of the four 801(b)(1) factors); Adjustment of Royalty Payable under Compulsory License for Making and Distributing Phonorecords, 46 FR 10466, 10479-81 (Copyright Royalty Tribunal 1981) (holding that, "[b]ased on our review of the entire record in this proceeding and the legislative history of the Act, we have determined that a reasonable adjustment of the statutory rate must look to the application and operation of the regulatory system of which it is an integral part," and then deriving from an analysis of the four 801(b)(1) factors a "reasonable" rate); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 FR 25394, 25409 (Librarian of Congress 1998) (hereinafter "1998 Librarian Decision") ("A statutory rate, however, need not mirror a freely negotiated marketplace rate – and rarely does – because it is a mechanism whereby Congress implements policy considerations which are not normally part of the calculus of a marketplace rate.").

monopoly power.[17] Those monopolies have, to repeat, very important social purposes: to stimulate innovation and to provide innovators fair rewards. But it must not be forgotten that they are monopolies nevertheless. Monopolies, it has been recognized for centuries, are dangerous. If abused, they can undermine the very purposes they are designed to advance. Compulsory licenses are one of the tools used to prevent abuse – to ensure that, in sensitive social and economic contexts – the interests of the public are adequately protected. They do so by *preventing* copyright owners from charging whatever the market will bear – in other words, by "compelling" them to license their works for less than they otherwise would be inclined and able to charge. The methodology proposed by Prof. Ordover and Dr. Pelcovits fails to appreciate that.

III. The Relevant History

21. The previous section established, I hope, the proposition that, in setting the rates applicable to the SDARS, the Court should take seriously the factors enunciated in section 801(b)(1). How should those factors be applied in the present context? In answering that question, the primary source of guidance, of course, should be the language of the statute itself. But, before turning to that language, it will help us to explore in somewhat more detail the history that lies behind section 114(f)(1) and its cross-references to section 801(b)(1).

22. Prior to 1972, federal copyright law provided no protection for sound

[17] See, e.g., Sony Corporation v. Universal City Studios, 464 U.S. at 429 n. 10 ("'In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public?'") (quoting H. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)); William Fisher, *Reconstructing the Fair Use Doctrine*, supra note 4, at 1699-1701. Cf. Graham v. John Deere Co., 383 U.S. 1, 5-7 (1966); Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813 (1984) (analyzing patent law in similar terms).

recordings. Musical works were included in the list of works shielded by the statute, but not the recordings in which they were often embodied. On several occasions beginning in the 1920s, groups involved in the production and distribution of sound recordings requested that Congress fill what they regarded as a gap in the coverage of the statute, but Congress refused, partly because of doubts concerning the amount of creativity involved in producing sound recordings, and partly because various state statutes seemed to be providing adequate protection against verbatim "piracy" of recordings.

23. In 1972, a sense that the "piracy" problem had become more serious[18] prompted Congress finally to extend federal copyright protection to sound recordings, but in doing so Congress limited the newly created right in two crucial respects. First, sound recordings were shielded against reproduction and the preparation of derivative works only when the copies or derivative works at issue "recapture" or "alter" the "actual sounds" of the originals.[19] In other words, imitations of sound recordings – unlike imitations of all other types of works – continued to be permissible. Second, again unlike all other types of works, sound recordings did not enjoy protection against "public performances" or "displays."

24. The principal reason for the latter limitation was Congress' recognition that many public performances of sound recordings – most importantly, broadcasts by radio stations – benefited the producers of those recordings by bringing them to the attention of potential purchasers of records, tapes, and compact discs embodying them.[20] (The best

[18] See S. REP. NO. 72, 92nd Cong., 2d Sess. (1971), at 3.

[19] See 17 U.S.C. §114(b).

[20] See, e.g., Debates on S. 1361, 93rd Cong., 2d Sess. (1974), 120 Cong. Rec. at 30479 (Remarks of Sen. Hruska), 30480-81 (Remarks of Sen. Gurney). Recognition of the promotional benefit of radio broadcasts to the producers of sound recordings invites a follow-up question: Why, then, do the owners of copyrights

evidence of that promotional benefit is that, at the time, the record companies routinely paid radio stations substantial sums – many millions of dollars per year – in the form of "payola" to include specific recordings in the stations' broadcasts.[21]) Unconvinced by this consideration, the record companies in ensuing years frequently sought a public-performance right, but for two decades Congress denied their requests.[22]

25. What disrupted this economic and statutory equilibrium was the development during the 1990s of technologies facilitating new kinds of public performances that, in the judgment of the record companies, threatened to corrode sales of sound recordings more than they promoted such sales. In 1995, in the Digital Performance Rights in Sound Recordings Act (DPRA), Congress agreed to address this hazard, not by granting the record companies' renewed request for a general public-performance right, but rather by creating a narrowly crafted right, on the part of the owners of sound-recording copyrights, against public performances in the form of "digital audio transmissions."[23]

26. In shaping this new right, Congress paid close attention to the magnitude of the potential "substitution effects" of specific forms of digital audio transmission – in other words, the hazard that such transmissions would cause listeners to purchase fewer copies of sound recordings. With respect to transmissions that seemed to pose especially

in musical works enjoy a public-performance right? Don't they too enjoy a promotional benefit when recordings embodying their works are broadcast? The traditional answer: The revenues that the owners of copyrights in musical works can collect when "mechanical copies" of their works are sold are usually capped by the compulsory license contained in section 115 of the statute (see paragraph 12, supra). Providing them adequate sources of revenue thus requires that they also be able to derive income from public performances.

[21] See Fisher, PROMISES TO KEEP, supra note 4, at 58-59.

[22] See S. REP. NO. 128, 104th Cong., 1st Sess. 10-13 (1995) (hereinafter "Senate DPRA Report").

[23] See H. REP. NO. 274, 104th Cong., 1st Sess. (1995) (hereinafter "House DPRA Report"), at 13 (describing the DPRA as "a narrowly crafted response to one of the concerns expressed by representatives of the recording community, namely that certain types of subscription and interaction [sic] audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work"). To the same effect, see Senate DPRA Report, at 15.

serious risks of substitution effects, Congress left the new right unqualified. In other words, a person who wished to engage in such activities would have to obtain from the sound-recording copyright owners freely negotiated, voluntary licenses. The chief example of such a technology is interactive webcasting services, which enable Internet users to request performances of specific songs.[24] At the opposite end of the spectrum are types of digital audio transmissions – for example, background-music services – that seemed to pose minimal danger of substitution effects.[25] As to these, Congress granted an outright exemption from the new public-performance right. In between these poles were various types of digital audio transmission that carried with them moderate "substitution" risks. One of the members of this intermediate category was digital satellite radio. To govern these, Congress used its now familiar "compromise" strategy – i.e., the imposition of a compulsory licensing system.

27. In so doing, Congress sought to balance several competing concerns. On one hand, it wanted to protect copyright owners from injury caused by consumers' substituting such services for purchases of sound recordings and to "provide copyright holders of sound recordings with the ability to control the distribution of their product." On the other hand, it wanted to avoid "hampering the arrival of new technologies" from which consumers derived important benefits.[26] The standard that, in Congress' judgment, would make possible reconciliation of these competing considerations was section 801(b)(1), supplemented by attention to the terms of voluntary licenses obtained for comparable services.

[24] See House DPRA Report at 14; Senate DPRA Report at 16. "Interactive services" are defined in 17 U.S.C. §114(j)(7).

[25] Senate DPRA Report at 14-15.

[26] See House DPRA Report at 12-14; Senate DPRA Report at 14-15.

28. In 1998, the emergence of still more digital technologies prompted Congress, in the Digital Millennium Copyright Act (DMCA), to adjust this scheme yet again. In making those adjustments, Congress preserved the basic statutory structure it had employed in the DPRA, but tuned it in various ways. In particular, noninteractive webcasters and new subscription services were subjected to a new compulsory-licensing standard (currently embodied in section 114(f)(2)(B)) that more closely approximated a "willing buyer, willing seller" approach. When making this change, however, Congress "grandfathered" the existing satellite radio services (as well as existing subscription services), making clear that they would continue to be governed by section 801(b)(1).[27]

29. With this history in mind, we turn our attention to the language of the statute itself. At various points, as we will see, the history will provide us assistance in determining how best to construe open-ended provisions.

IV. Interpreting 801(b)(1)

30. The text of section 801(b)(1) appears in paragraph 16, above. It directs the Court to consider four factors, set forth in subsections (A) through (D). The statutory factors overlap to some extent. Boiled down and rearranged slightly, they point toward the following considerations:

<u>Maximizing the availability of creative works to the public.</u>

31. This is the first factor identified in the statute.[28] Its prominence is not

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[27] See H. REP. NO. 105-796, CONFERENCE REPORT TO ACCOMPANY H.R. 2281, 105th Cong., 2d Sess. (1998) (hereinafter "DMCA Conference Report"), at 85.

[28] See 17 U.S.C. §801(b)(1)(A).

surprising. The ultimate goal of the copyright system, as we have seen, is to stimulate creative activity – *and then make the fruits of that activity available to the public.*[29] Pursuit of that objective in the present context would seem to require the selection of a statutory rate that simultaneously accomplishes two things: first, provide appropriate incentives for the creation of new works; and, second, provide appropriate incentives for the development and maintenance of delivery services, like the SDARS, that afford customers convenient access to those works.

32. Prior interpretations of subsection 801(b)(1)(A) – most notably, the 1998 ruling of the Librarian of Congress in the Preexisting Services CARP -- provide ample precedential support for attention to the first of these variables.[30] SoundExchange will likely point to the same ruling to urge the panel to go further and to ignore altogether the second variable.[31] As a result, SoundExchange may contend, this statutory factor tilts entirely in their favor.

33. Whatever the merits of SoundExchange's likely position as applied to 801(b)(1) in general, it seems unbalanced in the present context. Recall that, when adopting the DPRA and then amending it in the DMCA, Congress recognized the ways in which the recently developed delivery systems for digital audio recordings increased the availability of those recordings to the public:

> These new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible. . . . Such systems could increase the

[29] See the sources cited in note 7, supra.

[30] 1998 Librarian Decision at 25406.

[31] See id., at 25407 ("[T]he Register concludes that the record companies and the performers make the greater contribution in maximizing the availability of the creative works to the public, a conclusion consistent with past CRT precedent.")

> selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords.[32]

A central objective of the compulsory licensing system that Congress created (and then tuned) in those statutes was to ensure the continued deployment of the new technologies, which had such manifest public benefits.[33] It would thus be distinctly odd to exclude from the statutory factor that calls for "maximizing the availability of creative works to the public" consideration of the financial incentives necessary to sustain the new delivery systems, whose principal virtue, in Congress' judgment, was precisely to increase the availability of sound recordings to the public.

34. In short, this first factor, fairly applied, requires selection of a statutory rate that both encourages the development of new sound recordings and ensures the viability of the SDARS.

Minimizing Disruption of the Industry

35. This goal is made explicit in the fourth of the statutory factors.[34] It points in the same direction as the preceding theme. It counsels the Court to select a rate that will enable the SDARS services to earn a reliable profit and thus avoid either the collapse of those companies or the disruption inevitably associated with financial restructuring. To achieve that end, the Court should strive to predict the shoals that XM and Sirius must navigate in the next five years – and should then choose a compulsory rate that would enable them to avoid those hazards.

36. The manner in which subfactor (D) was construed in the 1998 Librarian

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[32] Senate DPRA Report at 14; House DPRA Report at 12.

[33] See S. REP. NO. 190, 105th Cong., 2d Sess. 2, 8 (1998).

[34] See 17 U.S.C. §801(b)(1)(D).

Decision clearly supports this interpretation. In that case, which involved analogous circumstances, the Librarian ruled that the three remaining factors [of section 801(b)(1)], especially the fourth factor, which requires that the rate be set "[t]o minimize any disruptive impact on the structure of the industries involved," see 17 U.S.C. 801(b)(1)(D), compels the Register to consider the economic health of the digital audio transmission industry."[35] Attention to the same factor here should prompt the Court to select a rate that will preserve the health of the satellite radio industry.

Relative Contribution

37. Subsection (C) of 801(b)(1) instructs the Court to select a rate that will "reflect the relative roles of the copyright owner and the copyright user" in generating and making available to the public creative works. This objective has deep roots in the copyright system as a whole. The Supreme Court has often emphasized that one aspiration of that system – an aspiration fully compatible with the project of maximizing the widespread dissemination of creative works – is giving the contributors to that project what, as a matter of fairness, they are "due." For example, in *Mazer v. Stein*, the Court insisted that, "Sacrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered."[36]

[35] 1998 Librarian Decision at 25410 (emphasis added).

[36] 347 U.S. 201, 219 (1954). For many examples of similar statements, see Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO STATE L.J. 517 (1990); and Lloyd Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1211-54 (1998). The compatibility of this goal with the larger aspiration of widespread dissemination of creative works was insisted upon by the Supreme Court in *Harper & Row*: "We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." Harper & Row v. Nation Enterprises, 471 U.S. 539, 545-46

38. Pursuit of this goal in contexts of the sorts governed by 801(b)(1) is tricky, because more than one entity has contributed to providing the public access to creative materials. Both thus "deserve" a fair return of the income generated by the activity at issue. How, then, should the pot be divided? The answer the statute provides is: Each contributor deserves a share proportional to his or its "relative contribution" to the project. This distribution principle also finds support both in copyright law and in the American political system in general. Social psychologists long ago discovered, through experimentation and surveys, that the large majority of Americans believe that the various contributors to an enterprise deserve shares of its output proportional to their contributions.[37] Many legal rules in various settings reflect that fundamental conviction.[38]

39. But how, exactly, does one measure the relative contribution of the record companies and the SDARS in making available to the public the rich collection of recordings, commentary, and other programming carried by the SDARS? The answer is

(1985).

[37] See J. Stacey Adams, *Toward an Understanding of Inequity*, 67 JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 422, 424 (1963); Reinhard Selten, *The Equity Principle in Economic Behavior*, in HANS GOTTINGER & WERNER LEINFELLNER, EDS., DECISION THEORY AND SOCIAL ETHICS (1978); Elizabeth Hoffman and Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEG. STUD. 259 (1985).

[38] One such rule is the doctrine of accession, which has been well summarized as follows: "Recognized since before the time of Blackstone's Commentaries, the law of accession deals with the ownership of property made up of materials of one person, combined with materials and/or labor of another. Whether the law of accession applies to a piece of property is determined by a number of principles, including whether the property of one individual can be separated or removed from the unified article, or whether the nature or identity of an individual's property has been transformed by the skill and labor of another. If the law of accession applies, a series of rules determine the ownership of the combined or transformed property and allocate its value and control. In short, accession vests title and control of a combined piece of property in the owner of its principal parts or in its primary transformer. Accession then directs the title holder to reimburse the owner of the secondary parts of a combined piece of property or its secondary transformer for her lesser contribution." Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U.L. REV. 271, 321 (1998) (footnotes omitted).

not obvious. Fortunately, the statute itself provides us guidance on that score. It identifies six dimensions with respect to which the relative contributions of the record companies and the SDARS themselves should be assessed:

- "creative contribution";
- "technological contribution";
- "capital investment";
- "cost";
- "risk"; and
- "contribution to the opening of new markets for creative expression and media for their communication."

40. At first glance, the first of these six subfactors would seem to tilt strongly in favor of the record companies. After all, much of the programming carried by the satellite services consists of recorded music, to which the record companies plainly have made important creative contributions. The balance on this subissue would thus seem to tilt clearly in their favor. Much of the force of the foregoing inference, however, dissipates when one considers the following additional circumstances: (i) A large and growing percentage of the material carried by the satellite services consists of programming they have developed themselves.[39] (ii) Even with respect to the programming that consists of recorded music, the satellite services have added many additional creative features.[40] (iii) Finally, the record companies have contributed nothing *new* to the satellite services. All of the sound recordings at issue were generated by the record companies for distribution through other channels. By contrast, as just suggested, the SDARS have

[39] See, e.g., Written Testimony of Eric Logan, paragraphs 25-34.

[40] See, e.g., id., at paragraphs 41-61.

made important *new* creative contributions to the set of materials delivered to their customers -- and will be making even larger contributions in the near future.

41. These additional considerations would seem to render the implications of the first subfactor more equivocal. But whatever one's judgment on that score, it seems clear that all of the remaining five subfactors identified in subsection 801(b)(1)(D) tilt decisively in favor of the SDARS. It is they who have made the enormous "technological contribution[s]" and "capital investment[s]" necessary to create the satellite radio systems. They have borne all of the "cost[s]" and "risk[s]" associated with launching the services. And they alone have contributed to the "opening of new markets for creative expression and media for their communication."[41] On balance, therefore, it seems apparent that attention to the parties' "relative contribution" should prompt the Court to be especially solicitous of the interests of the SDARS.

Fairness

42. We come, finally, to the most encompassing of the statutory factors: Subsection 801(b)(1)(B) directs the Court to "afford the copyright owner a *fair* return for his or her creative work and the copyright user a *fair* income under existing economic conditions."[42] As indicated above, treating all parties "fairly" is surely one of the main goals of the copyright system as a whole. One important implication of that objective in this particular context was discussed at length in the immediately preceding subsection: ensuring that both the record companies and the SDARS receive revenues proportional to their relative contributions to the satellite services. To review, the record companies have

[41] Cf. 1998 Librarian Decision at 25407 (coming to similar conclusions in analogous circumstances).

[42] 17 U.S.C. §801(b)(1)(B) (emphasis added).

made important "creative" contributions to those services, and the SDARS have also made important "creative" contributions, as well as major contributions in the form of technology, investment, cost, risk, and the opening of new markets. The ratio between the amount of money collected by the record companies in the form of statutory fees and the amount of money retained by the SDARS after the payment of those fees should, from this standpoint, approximate the ratio between the record companies' total contributions and the SDARS' total contributions.

43. But if subsection (B) is not to become mere surplusage, it must include additional aspects of "fairness" – i.e., aspects of fairness over and above rewarding the parties in proportion to their relative contributions. What might those additional aspects encompass? The following themes, though not dictated by the statutory language, seem consistent with that language, particularly when read against the background of the pertinent legislative history:

44. Providing investors returns commensurate with the risks they assume. People and firms that invest money in high-risk enterprises customarily expect returns much larger than those that invest in well-established enterprises. That practice is both efficient and fair. Over the long haul – taking into account the larger proportion of risky ventures that (by definition) fail – it provides the investors reasonable rates of return. Attention to this dimension of "fairness" should prompt the Court to try to avoid hindsight. In other words, the Court should not select a rate that will enable investors in the SDARS to earn only enough to match the returns they could have reaped by investing in electric companies or banks. Rather, it should select a rate that will enable the investors to reap returns commensurate with the high risks they undertook when they made their

investments.[43]

45. Rewarding pioneers. Latent in many aspects of the American legal system, including copyright and patent law, is the principle that pioneers – people and firms that develop truly novel, socially valuable products and services – deserve rewards larger than ordinary businessmen and craftsmen.[44] Attention to this dimension of fairness should prompt the Court to acknowledge the vision and determination of the founders and backers of the SDARS by ensuring that they reap an appropriate financial reward.

46. Protecting reasonable reliance interests. Many aspects of the American legal system are designed to ensure that persons who reasonably rely upon the representations of others are protected against injury resulting from the repudiation of those representations. Examples of rules that express and enforce this principle are the doctrine of promissory estoppel in contracts,[45] the doctrine of easements by estoppel in property law,[46] and the constitutional prohibition upon the retraction of governmental promises exemplified by the *Kaiser-Aetna* case in constitutional law.[47] The legislative history of

[43] The magnitude of those risks – and the concomitant legitimate expectations of the investors in the SDARS – are discussed in the testimony of Armand Musey. See Transcript of June 13, 2007, pp. 135-36, 149-50, 156-57.

[44] See, e.g., In re Horgan, 559 F.2d 595, 606 (C.C.P.A. 1977) (acknowledging that "pioneers" deserve broad patent claims to their inventions); Lawrence Becker, *Deserving to Own Intellectual Property*, 68 CHICAGO-KENT L. REV. 609 (1993) (contending that persons who engage in "creative" work deserve larger rewards than persons who engage in less creative work).

[45] See RESTATEMENT SECOND OF CONTRACTS §90 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

[46] See RESTATEMENT OF PROPERTY §519(4) (1944) ("A licensee under [an otherwise revocable license] who has made expenditures of capital or labor in the exercise of his license in reasonable reliance upon representations by the licensor as to the duration of the license, is privileged to continue the use permitted by the license to the extent reasonably necessary to realize upon his expenditures.").

[47] See Kaiser-Aetna v. United States, 444 U.S. 164, 180 (1979) ("While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property" -- expectancies that, if sufficiently important, the

the DMCA suggests that Congress had exactly this principle in mind when in 1998 it decided to continue to give the SDARS the benefit of section 801(b)(1), rather than subject them to the less favorable standard now embodied in section 114(f)(2)(B): "The two preexisting satellite digital audio radio services … have purchased licenses at auction from the FCC and have begun developing their satellite systems."[48] The most plausible reading of this statement is that Congress recognized the unfairness of changing the rules of the game after the SDARS had entered into contracts and made investments in reliance upon the prior regime. Applying the general principle underlying this recognition to the present proceeding, it suggests that the Court should avoid adopting a rate that frustrates legitimate expectations arising out of representations made by Congress when it first adopted DPRA. Among those representations, as we have seen, was an assurance that the compulsory license would not "hamper[] the arrival of new technologies."[49]

47. Credit for promotional benefits. Finally, a principle of fairness that has informed Congress' treatment of sound recordings for decades is that organizations that broadcast those recordings deserve credit for the promotional benefits they confer on the producers of those recordings. This principle, as we have seen, largely explains why, when Congress first extended copyright protection to sound recordings, it did not recognize a public-performance right. The primary reason why Congress in 1995 finally did recognize a public-performance right for selected types of digital audio transmissions is not that it had abandoned its recognition of the relevance of promotional benefits, but rather that it was concerned that substitution effects might, in some circumstances,

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Government must condemn and pay for before it takes over the management of the landowner's property.") (citations omitted).

[48] DMCA Conference Report, at 81.

[49] See note 26, supra, and the accompanying text.

exceed those promotional effects. Fidelity to Congress' stance on this issue should prompt the Court, when setting the statutory fees to be paid by the SDARS, to make sure that the SDARS are given appropriate credit for the promotional benefits that their services continue to confer on the record companies.

V. The Significance of Voluntary License Agreements by Comparable Services

48. It makes sense, when applying the 801(b)(1) factors, to consider the magnitude of the fees that comparable services have voluntarily paid in the past or are paying at present for permission to publicly perform sound recordings. The amount of those fees should surely not be determinative. As the Court of Appeals for the D.C. Circuit observed:

> The statute does not use the term "market rates," nor does it require that the term "reasonable rates" be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a "market rate" may not be "reasonable," and vice versa.[50]

But such voluntary agreements – if entered into by truly comparable parties in truly comparable circumstances – may cast some light on the magnitude of the prices that the services could afford or what other parties in the past may have considered fair.

49. A large portion of the testimony submitted in the principal stage of this proceeding has focused on the questions of (a) what voluntary agreements are truly "comparable" and (b) how much weight those agreements should be accorded. Much of the disagreement between the parties on those matters involves aspects of economics on which I have no expert knowledge – and, thus, as to which I cannot responsibly venture an opinion. But a few dimensions of the controversy implicate the relations among the

[50] Recording Industry Association of America v. Librarian of Congress, 176 F.3d 528, 533-34 (1999).

various parts of the copyright statute or the structure of the copyright system as a whole, matters on which I do have sufficient expertise to warrant expressing an opinion.

50. The first such issue concerns which is primary: the section 801(b)(1) factors; or the magnitude of fees paid voluntarily in comparable circumstances? The statute itself seems quite clear on this matter. The pertinent instruction in section 801(b)(1) is mandatory: "The rates applicable under sections 114(f)(1)(B) … shall be calculated to achieve the following objectives..." (emphasis added). By contrast, the pertinent instruction in section 114(f)(1)(B) is permissive: "In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)." (emphasis added) A natural inference from this contrast is that the obligatory section 801(b)(1) factors are primary, and the optional comparable voluntary rates are secondary.

51. A second issue concerns the order in which the analysis should proceed. Should one begin with comparable voluntary rates and then "adjust" them in light of the section 801(b)(1) factors, or should one instead look first to the section 801(b)(1) factors and then supplement the fruits of that analysis with consideration of comparable voluntary agreements? Administrative practice on this issue has varied. I doubt that the sequence makes a great deal of difference, provided that one keeps in mind the relative importance of the two inquiries. But, for what it's worth, the statute itself, by authorizing the Court to consider voluntary fees "in addition to" the section 801(b)(1) factors, seems

to suggest that the section 801(b)(1) factors should come first.

52. A third issue concerns which voluntary fees are relevant. The statute seems to limit the appropriate set quite sharply. Section 114(f)(1)(B) directs the Court's attention to "the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)" (emphasis added). The referent for the underlined phrase seems to be the agreements mentioned in the third sentence of section 114(f)(1)(A): "Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings." This language is not crystal clear, but it appears to limit the set of voluntary licenses that the Court may consider to those between "owners of sound recordings" and "preexisting subscription services, or preexisting satellite radio services." Only one of the voluntary agreements that has been presented to the Court during the primary phase of this proceeding would seem to qualify under this definition – namely, the contract between Music Choice and SoundExchange voluntarily extending the terms of a prior CARP ruling.

53. The interpretation offered in the preceding paragraph, though seemingly the best reading of the pertinent statutory provisions, would have a radical impact on this proceeding. Much of the evidence submitted thus far would be rendered irrelevant. If the Court were not willing to go that far, it should seriously consider another implication of the statutory language. Notice that section 114(f)(1)(A) refers to licenses entered into by the "owners of sound recordings." The implication: contracts between the SDARS

and disk jockeys or radio personalities would fall outside the pale. There are good policy reasons, in addition to the statutory language, to adhere to such a limitation: the services of disk jockeys and radio personalities are, in practice, rivalrous. In other words, Howard Stern cannot simultaneously work for Sirius and KISS. By contrast, sound recordings (like all innovations shielded by copyright law) are nonrivalrous in character. In other words, they can be enjoyed by unlimited numbers of consumers simultaneously. (A recording of Layla can be played on Sirius, XM, and KISS at the same time.) The economic considerations applicable to the creation of optimal incentives for the production of rivalrous and nonrivalrous goods are fundamentally different.[51] It thus makes good sense for the statute to exclude from the Court's purview license agreements, no matter how voluntary, struck between the SDARS and suppliers of services like Howard Stern.

VI. The analogy to Section 111

54. The final issue that I have been asked to address in my testimony concerns a specific aspect of subsection 801(b)(1)(C). Judge Roberts, I have been told, has asked whether calculation of the "creative contributions" of the SDARS within the meaning of that subsection should be informed by the manner in which, during previous compulsory-license rate-setting proceedings, analogous creative contributions by broadcasters have been considered when applying section 111(d) of the copyright statute.

55. As Judge Roberts points out, the broadcasters' contributions have ordinarily

[51] See, e.g., Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STATISTICS 387 (1954); Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (1962); Menell and Scotchmer, supra note 8, at 1-3.

been treated as negligible in those proceedings. For example, in a 1986 decision, the Copyright Royalty Tribunal made the following finding:

> [In the proceeding before us,] NAB relitigated the question of compilation of the broadcast day, and the local broadcasters' share to an award for radio. In the 1978 proceeding, the Tribunal rejected NAB's claim to any value for the local broadcasters' compilation of the broadcast day. In the 1980 proceeding, we reached the same conclusion stating, "cable systems are interested in the programs on a distant signal which induce persons to subscribe, not in the scheduling and promotion." In this proceeding, NAB's witness Protter gave the Tribunal no new insight to modify our previously held views. In fact, he stated that a broadcast[er] designs his broadcast day for the local market and not for the distant market, and as a broadcaster, how his scheduling would appeal to others outside of his market was not his concern. We continue to hold to our view that NAB's compilation claim has no value.[52]

56. The more extensive discussion of the same issue by the Copyright Royalty Tribunal in the 1980 Proceeding, to which the foregoing passage refers, reads in pertinent part:

> We have made a total award of 4.5% to U.S. television broadcasters for their entitlement to royalty fees for distant carriage of station programming, and for sports programming. For lack of persuasive evidentiary justification we have not included in our award any sums for broadcast day compilations.
>
> Although the case of the commercial broadcasters during the 1979 and 1980 proceedings was presented with a degree of coherence lacking in the 1978 case, we have found no occasion to modify the findings made in our 1978 determination and affirmed in our 1979 determination. We reaffirm our previous findings concerning the application of the criteria to the record evidence relating to station programming.
>
> We have reviewed our previous findings in the light of the survey presented by NAB of cable operators attitudes toward different types of programming in attracting and keeping subscribers. Neither the SRI study nor any other evidence requires an alteration of our findings that station programming is only of "marginal value to cable operators." We have

[52] 1983 Cable Royalty Distribution Proceeding, 51 FR 12792, 12812 (1986) (citation omitted).

never asserted that station programming is of no value to cable operators, but the value of such programming is adequately compensated in our award to commercial television....

We have considered all of the evidence in our record related to the entitlement of commercial telecasters to share in the royalties for sports programming in the light of the decision of the U.S. Court of Appeals for the District of Columbia Circuit. While the character of the Court's explanation of its decision leaves room for improvement, we find nothing in that decision which requires more than our making a judgment (in the absence of relevant cable royalty contractual provisions) of the contribution of the broadcaster to the value and appeal of the sports programming to cable operators and subscribers. We find that for the purposes of cable royalty distribution, the contribution of the broadcaster as compared with that of the teams is minimal, and that it is reasonably reflected in a total award of 4.5% to the commercial television claimants.

We do not dispute that high quality production enhances the enjoyment of a sports telecast. We cannot accept, however, the NAB position that when functioning as the producer of the telecast, the broadcaster should receive one half of the sports royalties. We find no evidence in our record, including that of the NAB sports witnesses, establishing that the contribution of the broadcaster in any significant respect contributes to a cable operator's interest in sports programming, or the decision of an individual to subscribe to cable television....

NAB is seeking compensation in this proceeding for television broadcast compilations. In our 1978 royalty determination, we stated with regard to the evidence presented by NAB in justification of their claim to royalties for the broadcast day compilation:

> We find that this testimony and the record as a whole provides no basis for establishing the value of the broadcast day nor does it provide any basis for a distribution of royalties to broadcaster claimants on this theory.

We reach the same result in this proceeding. We have once again heard the NAB evidence. As with other elements of the NAB case, the packaging is better than the 1978 case but the box when opened is still empty. We find that broadcast day compilation is of no value to a cable system. We reject the argument of NAB that it is the broadcast compilation which creates "a station image which is highly promotable by cable operators." Cable systems are interested in the programs on a distant signal which induce persons to subscribe, not in the scheduling and promotion.[53]

[53] 1980 Cable Royalty Distribution Determination, 48 FR 9552, 9565-66 (1983) (citations omitted).

57. The skepticism reflected in these (and other) passages concerning the claims of the broadcasters might seem, as Judge Roberts suggested, to cast doubt on the claim by the SDARS that they deserve credit, under the auspices of subsection 801(b)(1)(C), for their "creative contributions" to the services they make available to the public. Two independent considerations, however, counsel against making this analogy.

58. First, the relevant statutory provisions are materially different. Subsection 111(d)(3), which governs the proceedings to which Judge Roberts has referred, provides:

> The royalty fees thus deposited shall, in accordance with the procedures provided by clause (4), be distributed to those among the <u>following copyright owners</u> who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:
>
> (A) any <u>such owner</u> whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and
>
> (B) any <u>such owner</u> whose work was included in a secondary transmission identified in a special statement of account deposited under clause (1)(A); and
>
> (C) any <u>such owner</u> whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs. (emphasis added)

By contrast, subsection 801(b)(1)(C), which governs the present proceeding, does not limit the Court's attention to "copyright owners," but directs its attention to a broader array of parties:

> The rates applicable under sections 114(f)(1)(B) … shall be calculated to achieve the following objectives: …
>
> (C) To reflect the relative roles of <u>the copyright owner and the copyright user</u> in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for

creative expression and media for their communication. (emphasis added)

59. This distinction is readily understandable when one considers the different purposes of the proceedings governed by the two provisions. With respect to every compulsory license, two questions must be answered: First, how much money must the beneficiary of the compulsory license pay to the owners of the copyrights in the material in question? Second, how should that pot of money be distributed among the various copyright owners? With respect to the compulsory license for secondary transmissions by cable television systems, the first question is answered by the statute itself. Subsections 111(d)(1)(B), (C), and (D) prescribe the amounts of money that eligible cable systems must pay. Only the second question is left to be determined by an administrative tribunal (in the absence of agreement among the parties), subject to (very limited) judicial review. It is thus unsurprising that section 111(d)(3) – and the jurisprudence interpreting it –concentrates on the relations among the <u>copyright owners</u> – a focus that, in turn, naturally suggests exclusive concern with the relative magnitude of their <u>copyrightable</u> contributions. By contrast, a proceeding under section 801(b)(1), like the present, is concerned with the first of the two questions. Again, it is thus unsurprising that the pertinent statutory provision casts its net wider. The bottom line: decisions interpreting and applying section 111(d)(3) have only limited value when interpreting and applying 801(b)(1).

60. The second, independent reason why the fate of the broadcasters' claims in section 111 proceedings does not undermine the SDARS' facially analogous claims is more fact-based. Crucial to the repudiation of the broadcasters' arguments were factual findings that the consumers of cable television services simply did not value the

broadcasters' contributions to the programming at issue. In other words, the primary basis of each of the pertinent ruling was a judgment that the broadcasters' contentions that they were contributing material that attracted cable customers lacked "evidentiary justification."[54] By contrast, in the present proceeding, witnesses have testified concerning both the extensive "creative contributions" made by the SDARS to the collection of recordings they make available to the public and the value of those contributions to their subscribers.[55]

61. In sum, for two separate reasons, the SDARS' position in this proceeding is not undermined by the ways in which the claims of the broadcasters have been resolved in prior §111 proceedings.

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[54] See 1980 Cable Royalty Distribution Determination, 48 FR 9552, 9566 n.260 (1983),

[55] See, e.g., Oral Testimony of Steven Blatter, Transcript of June 11, 2007, pp. 84-100.

I hereby declare under penalty of perjury that the foregoing is true to the best of my knowledge, information and belief.

William W. Fisher III

William W. Fisher III

Executed July 24, 2007.

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CONSULTING AND TESTIMONY

Testimony on "The Internet and the College Campus: How the Entertainment Industry and Higher Education are Working to Combat Illegal Piracy," before the Subcommittee on Twenty-First Century Competitiveness of the Committee on Education and the Workforce, United States House of Representatives (Sept. 26, 2006)

Expert Witness on behalf of American webcasters and broadcasters concerning the digital performance right in sound recordings, Copyright Arbitration Royalty Panel, No. 2000-9

Adviser to Gotuit Media (http://www.gotuit.com/), 2000-present

Adviser to the United Kingdom Department for International Development concerning the impact of "terminator-gene" technology on developing countries, 1999

Adviser to the Presidents of Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica concerning the reform of property and intellectual-property systems in those countries, 1997-2001

Consultant to many private clients concerning copyright and patent law

CERTIFICATE OF SERVICE

I hereby certify that the Public Rebuttal Witness Testimony and Exhibits Jointly Submitted by Sirius Satellite Radio Inc. and XM Satellite Radio Inc. was served on July 27, 2007 via email without exhibits and via courier with exhibits on the following party:

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